



Federal Communications Commission
Washington, D.C. 20554

May 14, 2014

DA 14-656

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RE: Data-Max Wireless, LLC, Request for Waiver and Extension of Time of Tribal Land Bidding Credit Requirements, Call Sign WQJQ674, File Number 0005662520

Dear Mr. Movshin and Ms. Kostyu:

In this Letter Order, we grant, in part, a Request for Waiver and Extension of Time of Tribal Land Bidding Credit Requirements (Waiver Request)¹ filed by Data-Max Wireless, LLC (Data-Max), which seeks waiver of certain of the Commission's rules and reinstatement of Data-Max's license in order to allow it to complete construction pursuant to the Commission's tribal lands bidding credit (TLBC) program requirements. We find that a limited waiver of the Commission's rules and reinstatement of Data-Max's license will facilitate the provision of wireless broadband service to the Hualapai Indian Reservation while maintaining the integrity of the TLBC program.

Data-Max was the winning bidder for a Lower 700 MHz B Block license for the Arizona 1 – Mohave (CMA318) in Auction No. 73,² and the Wireless Telecommunications Bureau granted the license, Call Sign WQJQ674, on November 26, 2008.³ Data-Max received a TLBC to serve the Hualapai Indian Reservation in the amount of \$217,000, which was equal to fifty percent of its gross bid in Auction 73 of \$434,000.⁴ As a condition of receiving the TLBC, Data-Max was required to construct and operate "a system capable of serving seventy-five (75) percent of the population of the qualifying tribal land for which the credit was awarded" within three (3) years of the license grant.⁵ Because unfettered use of the wireless spectrum may not have been possible due to the digital television (DTV) transition process, the Commission established June 13, 2012, as the three-year construction deadline.⁶ Under section

¹ See Data-Max Wireless, LLC, Request for Waiver and Extension of Time of Tribal Land Bidding Credit Requirements, Call Sign WQJQ674, File Number 0005662520, filed Feb. 22, 2013 (Waiver Request).

² See Auction of 700 MHz Band Licenses Closes, Winning Bidders Announced for Auction 73, *Public Notice*, 23 FCC Rcd 4572 (WTB 2008) (700 MHz Closing Public Notice).

³ See Wireless Telecommunications Bureau Grants 700 MHz Band Licenses, Auction Event No. 73, Report No. AUC-73 (Auction No. 73), *Public Notice*, 23 FCC Rcd 17074 (WTB 2008).

⁴ See 700 MHz Closing Public Notice; 47 C.F.R. § 1.2110(f)(3)(iv).

⁵ 47 C.F.R. § 1.2110(f)(3)(vii).

⁶ The 700 MHz Band was made available for wireless services as a result of the DTV transition. The DTV Delay Act extended the deadline by which television broadcasters were required to complete the transition of their

1.2110(f)(3)(vii), a licensee that receives a TLBC must, within fifteen (15) days of the tribal lands construction deadline, certify that the TLBC recipient has met the tribal lands construction requirement.⁷ Further, pursuant to the penalty provisions of section 1.2110(f)(3)(viii), a TLBC recipient that fails to provide the post-construction certification as required must repay the bidding credit amount in its entirety, plus interest, within thirty (30) days of the applicable tribal lands construction deadline.⁸ Failure to repay as required results in automatic termination of the license.⁹ Data-Max therefore was required to file its tribal lands construction certification by June 28, 2012 indicating that it had met its June 13, 2012 deadline, but it failed to do so. Accordingly, Data-Max was required to pay back its TLBC plus interest by July 13, 2012, or lose its license.¹⁰ As Data-Max failed to repay its TLBC (plus accrued interest) by July 13, 2012, its license automatically terminated on that date.

On February 22, 2013, Data-Max filed a request for waiver of sections 1.946(e), 1.2110(f)(3)(vii) and 1.2110(f)(3)(viii) of the Commission's rules, seeking waiver of the TLBC construction and repayment deadlines, as well as a two-year extension of the TLBC construction deadline (Waiver Request).¹¹ In its Waiver Request, Data Max provided that its failure to meet the TLBC construction deadline, as well as its failure to seek a timely request for extension of the deadline, was due primarily to a misunderstanding of the applicable construction deadline stemming from changing DTV transition deadlines and Commission orders implementing the DTV transition, as well as construction extensions granted to Lower 700 MHz A Block licensees.¹² Data-Max further argued that, notwithstanding its confusion over the applicable deadline, it would not have been able to meet the three-year TLBC construction deadline due to circumstances beyond its control.¹³ Data-Max stated that prior to its TLBC deadline, there was a lack of viable equipment capable of providing fixed LTE service in the Lower 700 MHz band such that it would not have been able to meet the June 13, 2012 deadline. Data-Max argued that despite Data-Max's good faith efforts to deploy its network, the lack of suitable fixed LTE equipment prevented it from meeting the construction required by the Commission's TLBC rules.¹⁴

Data-Max stated that the public interest would be served by granting relief and that the underlying objective of the TLBC to bring communications services to Tribal communities would otherwise be thwarted.¹⁵ Data-Max noted that it already has made significant investments and progress in

facilities to new digital channels from February 17, 2009 to June 12, 2009. *See Implementation of the DTV Delay Act, Second Report and Order and Notice of Proposed Rulemaking*, 24 FCC Rcd 2526 (2009) (*DTV Delay Order*); *DTV Delay Act*, Pub. L. No. 111-4, 123 Stat. 112 (2009) (*DTV Delay Act*). The 700 MHz spectrum therefore became available for wireless use as of June 13, 2009.

⁷ 47 C.F.R. § 1.2110(f)(3)(vii).

⁸ 47 C.F.R. § 1.2110(f)(3)(viii).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See Data-Max Wireless, LLC, Request for Waiver and Extension of Time of Tribal Land Bidding Credit Requirements for 700 MHz B Block License WQJQ674, ULS File Number 0005662520, filed Feb. 22, 2013 (Waiver Request).*

¹² *Id.* at 10.

¹³ *Id.* at 13.

¹⁴ *See id.* at 14.

¹⁵ *See id.* at 15, 18.

constructing infrastructure for a fixed LTE system that can provide wireless broadband services to the Hualapai Reservation, and that once Data-Max can obtain suitable equipment, it will be able to finish its network and deploy service promptly.¹⁶ Data-Max further requested that, to the extent that the Commission does not waive or extend the construction deadline set out in section 1.2110(f)(3)(vii), the Commission waive the automatic termination provision of the TLBC conditioned upon repayment of the TLBC.¹⁷ More recently, Data-Max filed a supplement to its Waiver Request, again urging the Commission to grant a waiver of the automatic termination provision of section 1.2110(f)(3)(viii) conditioned upon expeditious payment of the credit by Data-Max.¹⁸ Moreover, Data-Max reaffirmed its commitment to construct a fixed broadband wireless network that will serve the Hualapai Tribe.¹⁹ Data-Max has since repaid the TLBC plus interest/penalties as required under the Commission's rules in a good faith effort to expedite resolution of this matter and to help bring itself into compliance.²⁰

Section 1.946 of the Commission's rules governs extensions of construction periods for stations in the wireless radio services.²¹ The rule provides that relief may be granted for good cause if such relief is requested before the expiration of the construction period.²² Because Data-Max did not request an extension of the tribal lands construction requirement in a timely manner, Data-Max requires a waiver of section 1.946(e) to allow consideration of its untimely filing. The Commission has repeatedly emphasized that requiring licensees to timely seek relief serves important public policy objectives and has dismissed untimely requests for relief.²³ The Commission may, however, entertain late-filed petitions where it is in the public interest to grant relief. If a licensee does not file a request to extend the

¹⁶ *Id.* at 18.

¹⁷ *Id.* at 18, note 31.

¹⁸ Data-Max Wireless, L.L.C. Supplement to Request for Waiver and Extension of Tribal Land Bidding Credit Requirements, dated February 10, 2014 (Supplement). Filings relating to a request for waiver or extension of time generally must be filed electronically through the Universal Licensing System (ULS). See 47 C.F.R. § 1.913(a)(1). Here, Data-Max could not file the Supplement through ULS because the station license automatically terminated by operation of the Commission's rules. We therefore grant Data-Max such waivers as necessary to allow full consideration of Data-Max's request for relief.

¹⁹ Supplement at 3.

²⁰ See 47 C.F.R. §§ 1.1940, 1.2110(f)(3)(iii). Data-Max provided repayment on February 27, 2014.

²¹ 47 C.F.R. § 1.946(e).

²² *Id.*

²³ See Nathan Sherman Enterprises, Inc., Lubbock SMR, Inc., S&C Investments, Inc., Triangle Communications, Inc., Mobilecom One, L.L.C., Hawaiian Wireless, Inc., HBS Communications, Inc., SRI, Inc. and Spectrum Resources of the Northeast, Inc., *Order*, 16 FCC Rcd 11150 (2001) ("As a general matter, allowing the filing of untimely extension requests... would undermine orderly and efficient spectrum management, lead to administrative uncertainty and delay, and hinder [the Commission's] ability to relicense scarce spectrum resources to other licensees who are ready and able to construct"); see also Request For Extension of Time to Construct an Industrial/Business Radio Service Trunked Station, Call Sign WPNZ 964, File No. 0000356906, *Memorandum Opinion and Order*, 18 FCC 22055 (WTB, CWD 2003); Instapage Network, Ltd., Notification of Construction and Request for Waiver of Narrowband PCS Station KNKV222, File No. 0000175254, *Order on Reconsideration*, 17 FCC Rcd 19083 (WTB 2002) (*Instapage*); Interstate Power and Light Co., *Order*, 18 FCC Rcd 11051 (WTB PSPWD 2003); Vijay Ravenkar, The Port Authority of New York and New Jersey, Requests for Waiver to Permit Untimely Filing and to Extend the Construction Period for Station WQPK961, File No. 0006191959, *Letter Order*, DA 14-473 (WTB MD rel. April 8, 2014) (inattention to Commission rules due to oversight is not a compelling basis for a waiver) (*Ravenkar*).

construction period before its expiration, a waiver from Section 1.946(e) to permit untimely filing may be granted, pursuant to section 1.925(b)(3) of the Commission's rules, if the petitioner establishes that: 1) the underlying purpose of the rule would not be served or would be frustrated by application of the instant case, and that grant of the waiver would be in the public interest; or 2) where the petitioner establishes unique or unusual factual circumstances, that application of the rules would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁴ Despite Data-Max's failure to file its petition until after its tribal lands construction period had lapsed, we find that based on the totality of factors presented, good cause exists to consider the merits of Data-Max's petition and to grant a limited waiver of the Commission's rules.²⁵

We conclude that the underlying purpose of the rules would not be served, and that the public interest supports a waiver of the automatic termination provision found in section 1.2110(f)(3)(viii) and reinstatement of Data-Max's license. The Commission established the tribal lands bidding credit program in order to encourage the deployment of wireless telecommunications services to underserved tribal areas.²⁶ From a review of services currently being provided on the Hualapai Indian Reservation, it appears that, while some wireless service is available, little or no wireless broadband services are currently being offered to this community.²⁷ While the scarcity of ubiquitous telephony and advanced services available to this community favors granting relief, any relief provided must also be in line with policies underlying the stringent performance requirements and penalties put in place by the Commission to ensure that applicants awarded bidding credits rapidly deploy facilities and provide service to tribal lands.²⁸

We find that the remedy identified by Data-Max in its Waiver Request and Supplement, serves the underlying purposes of the tribal lands bidding credit rules without jeopardizing the integrity of the tribal lands bidding credit program.²⁹ As noted, Data-Max has previously repaid the TLBC and interest as specified in the Commission's rules, and has committed to constructing facilities and providing service to the Hualapai Indian Reservation in a manner consistent with the TLBC rules upon reinstatement of its

²⁴ 47 C.F.R. § 1.925(b)(3); *see also Ravenkar* at 3.

²⁵ We note that confusion over applicable Commission rules is insufficient, on its own, to excuse failure to comply with the Commission's rules. *See e.g. Instapage*, 17 FCC Rcd at 19091 ¶ 16; Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, 12 FCC Rcd 17087, 17099 ¶ 22 (1997) (the Commission expects, and it is each licensee's obligation, to know and comply with all of the Commission's rules). However, as discussed herein, we find that the totality of factors presented by Data-Max including the policy objectives that would be advanced by reinstatement of Data-Max's license warrant consideration and partial grant of the late-filed request for relief.

²⁶ *See Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 11794 (2000) (*Tribal Lands R&O*).

²⁷ Those living on tribal lands largely lack broadband access, and the Commission has stated that this lack of availability presents serious impediments to Native Nations' efforts to preserve their cultures and build their internal structures for self-governance, economic opportunity, health, education, public safety, and welfare. *See Improving Communications Services For Native Nations*, CG Docket No. 11-41, *Notice of Inquiry*, 26 FCC Rcd 2672 (2011). There is no comprehensive data on broadband deployment on tribal lands; however, previous estimates have approximated availability at less than ten percent. *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010) at 152, Box 8-4 and citations therein; available at <http://www.broadband.gov/plan/>.

²⁸ *See Tribal Lands R&O*, 15 FCC Rcd at 11,807, ¶ 35.

²⁹ Although Data-Max argues that it was unable to meet the TLBC construction due to lack of fixed LTE devices for 700 MHz, we do not reach that issue here in light of Data-Max's alternative proposal.

license. We find that this resolution advances both policy objectives of the TLBC rules; the limited relief proposed by Data-Max furthers the TLBC's underlying purpose by facilitating the deployment of high speed, advanced wireless offerings to a tribal community that currently does not have access to such service, yet does not contravene the purpose of the heightened performance and penalty provisions of the TLBC rules which are meant to ensure that licensees quickly and diligently construct and provide service to the applicable tribal areas as required or suffer consequences for lack of compliance.

We are further influenced by Data-Max's diligence in taking appropriate measures to construct its 700 MHz network. Data-Max has demonstrated that it has already taken meaningful steps towards construction of its network by its significant investments and progress in constructing the necessary infrastructure that will be used to serve the Hualapai Reservation. It appears from the record that Data-Max has diligently sought out equipment manufacturers and resellers to find fixed LTE broadband equipment for use with its lower 700 MHz B Block license, and appears to have recently identified appropriate equipment. Nothing in the record suggest that Data-Max will not continue its efforts to construct a network to provide service to the Hualapai Indian Reservation as well as the rest of its Mohave County, Arizona market, and there is no indication that Data-Max is simply seeking to warehouse its spectrum.

Further, Data-Max is continuing to work with tribal authorities to facilitate construction of Data-Max's network and service to the Hualapai Tribe. Importantly, the Hualapai Tribal Council (Council) has filed in support of Data-Max, stating that Data-Max will, as a local company, be able to provide services beneficial to Hualapai tribal members.³⁰ The Council believes that Data-Max is more likely to provide these services to the tribal community than a 'larger carrier,' and requests that we grant relief in this matter.³¹

Accordingly, we conclude that, in light of the totality of factors presented here, the public interest would be served by granting limited relief in the form of a waiver of the automatic termination provision of section 1.2110(f)(3)(viii) of the Commission's rules and reinstatement of Call Sign WQJQ674. This limited waiver and reinstatement is conditioned upon completion by Data-Max of construction equivalent to the TLBC performance requirement in section 1.2110(f)(3)(vii); that is, Data-Max must construct and operate a system covering seventy-five (75) per cent of the population of the qualifying tribal land (*i.e.* the Hualapai Indian Reservation) in its market as part of its overall required buildout. Data-Max must include this tribal coverage as part of their interim construction showing.

The effect of this limited waiver places Data-Max in the same position to that of Lower 700 MHz B Block TLBC recipients that timely repaid their bidding credits or those who did not receive a TLBC. Notwithstanding its continuing obligation to construct and provide service to the Hualapai Indian Reservation, Data-Max is therefore subject to rules generally applicable to all other such licensees, including the time period in which it must complete its interim and final construction obligations. In the recent *700 MHz Interoperability Report and Order*, the Commission took steps to facilitate an industry consensus solution designed to resolve the lack of mobile device interoperability in the 700 MHz band.³² In order to provide licensees sufficient opportunity to evaluate their networks in light of the *700 MHz*

³⁰ See Letter from Sherry J. Counts, Chairwoman, Hualapai Tribal Council, to the Federal Communications Commission, dated November 24, 2013.

³¹ *Id.*

³² Promoting Interoperability in the 700 MHz Commercial Spectrum, *Report and Order and Order of Proposed Modification*, 28 FCC Rcd 15122 (2013) (*700 MHz Interoperability Report and Order*).

Interoperability Report and Order and the industry consensus plan, the Commission extended, in part, the interim 700 MHz construction deadline to December 13, 2016 for all active Lower 700 MHz B Block licensees. Accordingly, Data-Max must satisfy its interim construction requirements, including the required buildout of the Hualapai Indian Reservation, by December 13, 2016. We specify that, to the extent that Data-Max does not satisfactorily meet the required tribal lands construction by December 13, 2016, we will find that Data-Max has not met its interim construction requirement, regardless of the amount of construction completed in other parts of Data-Max's market.

Accordingly, IT IS ORDERED, that pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 1.3, 1.925, 1.946(e), and 1.2110(f)(3) of Commission's Rules, 47 C.F.R. §§ 1.3, 1.925, 1.946(e), 1.2110(f)(3), that the Request for Waiver and Extension of Time of Tribal Land Bidding Credit Requirements filed by Data-Max Wireless, LLC, on February 22, 2013, and supplemented on February 20, 2014, is GRANTED to the extent described herein and is otherwise DENIED, and the license for Station WQJQ674 is hereby RETURNED to active status.

IT IS FURTHER ORDERED that pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 1.3, 1.925, 1.946, and 27.14(g) of Commission's Rules, 47 C.F.R. §§ 1.3, 1.925, 1.946, and 27.14(g), that the deadline by which Data-Max Wireless, LLC, must meet its interim performance requirement for station license WQJQ674 is extended to December 13, 2016. As part of its interim performance requirement for station license WQJQ674, Data-Max Wireless, LLC, must construct and operate a system capable of serving seventy-five (75) percent of the population of the tribal land for which it was previously granted a bidding credit pursuant to section 1.2110(f)(3) of the Commission's rules, 47 C.F.R. § 1.2110(f)(3).

These actions are taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

Sincerely,

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau